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Supreme Court of the United States

OCTOBER TERM, 1948

HEMAN MARION SWEATT,

Petitioner,

v.

THEOPHILIS SCHICKEL PAINTER, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM OF AMERICAN JEWISH CONGRESS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

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INDEX

	PAGE
JURISDICTION	2
STATEMENT OF THE CASE	3
THE QUESTION PRESENTED	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
POINT I—The question whether the equal protection clause of the Fourteenth Amendment can ever be satisfied by the attempted provision of "separate but equal" public facilities for Negro and white residents is one of substantial public importance which should be reconsidered by this Court. The petition for writ of certiorari should therefore be granted	4
POINT II—The equal protection clause of the Fourteenth Amendment can never be satisfied by the attempted provision of "separate but equal" facilities for Negro and white residents	11
A. State classification and segregation of a racial or religious group as inferior is a denial of equal protection of the law in violation of the Fourteenth Amendment	11
1. The constitutional command of equal protection requires more than mere physical equality	11
a. The law recognizes such intangibles as location	11
b. In determining equality of value, social values must also be considered	12

PAGE

2. A State may not use the device of supplying segregated facilities in order to place a racial or religious group in an inferior status 13

3. The placing of a racial or religious group in an inferior status by segregation can be accomplished by the States without an express declaration of such status 14

B. The system of State-controlled segregation of Negroes is designed to maintain them in an officially declared status of inferiority and in a previously established status of social inequality 17

1. Official declarations of inferiority 17

2. The previously established social inequality 19

C. The system of State imposed segregation on Negroes serves no purposes other than to maintain Negroes in an inferior status 20

CONCLUSION 21

TABLE OF AUTHORITIES

Decisions PAGE

Anderson v. Pantages Theatre Co., 114 Wash. 24 20

Bailey v. Alabama, 219 U. S. 219 (1911) 15

Baylies v. Curry, 128 Ill. 287 (1889) 20

Bolden v. Grand Rapids Operating Co., 239 Mich. 318 (1927) 20

Buchanan v. Warley, 245 U. S. 60 (1917) 10

Clark v. Directors, 24 Iowa 67 (1868) 20

(1919) 19

Crosswaith v. Bergin, 95 Colo. 241 (1934) 20

Ferguson v. Gies, 83 Mich. 358 (1890) 20

Flood v. News and Courier Co., 71 S. C. 112 (1905) 18

Guinn v. U. S., 238 U. S. 347 (1915) 14

Henderson v. Mayor, 92 U. S. 259 (1875) 15

Hirabayashi v. U. S., 320 U. S. 81 (1943) 10, 13

Jones v. Kehrlein, 49 Cal. App. 646 (1920) 20

Joyner v. Moore-Wiggins Co. Ltd., 152 App. Div. 266 (N. Y., 1912) 20

Korematsu v. U. S., 323 U. S. 214 (1944) 13

Missouri ex rel. Gaines v. Canada, 305 U. S. 327, 676 (1938) 12

Myers v. Anderson, 238 U. S. 368 (1915) 14

Nagl v. Delaware, 103 U. S. 370 (1881) 14

O'Connor v. Dallas Cotton Exchange, 153 S. W. 2d 266 (Tex., 1941) 18

PAGE

Oyama v. California, 332 U. S. 633 (1948) 12, 13

Penn. Coal Co. v. Mahon, 260 U. S. 393 (1922) 15

People v. Board of Education of Detroit, 18 Mich. 400 (1869) 20

Perez v. Lippold, 32 Adv. Cal. 757, 198 Pac. 2d 17 (1928) 21

Pickett v. Kuchan, 323 Ill. 138 (1926) 20

Plessy v. Ferguson, 163 U. S. 537 (1896) 3, 4, 5, 6, 9, 10, 11, 19

Poindexter v. Greenhow, 114 U. S. 270 (1884) 14

Prowd v. Gore, 207 P. 400 (Cal., 1922) 20

Railway Mail Association v. Corsi, 326 U. S. 88, 94 (1945) 5

Randall v. Cowlitz Amusements, 194 Wash. 92 (1938) 20

Shelley v. Kraemer, 334 U. S. 1 (1948) 10

Smith v. Allwright, 321 U. S. 649, 665 10

Strauder v. West Virginia, 100 U. S. 303 (1879) 17

Stultz v. Cousins, 242 F. 794 (C. C. A. 6th, 1917) 18

Tape v. Hurley, 66 Col. 473 (1885) 20

U. S. v. Carolene Products, 304 U. S. 144 (1938) 17

Wolfe v. Georgia Railway Electric Co., 2 Ga. App. 499 (1907) 18

Wysinger v. Crookshank, 82 Cal. 588 (1890) 20

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 14, 15

Statutes

PAGE

General Laws under the Seventh Legislature of the State of Texas, Chapter 121 ..... 17, 18

Laws passed by First Legislature of the State of Texas, An Act to Regulate Proceedings in a District Court, Section 65 18

Laws passed by the First Legislature of the State of Texas, An Act to Provide for the Enumeration of the Inhabitants 18

Polizeiverordnung ueber die Kennzeichnung der Juden vom 1 September 1941, RGBI, I. S. 547, Ausgeg. am 5. Ix. 1941 14

Miscellaneous

Bond, Education of the Negro in the American Social Order (1934) 9

Davis and Dollards, Children of Bondage (1940) 9

De A. Reid, Southern Ways, Survey Graphic (Jan. 1947) 7

Deutscher and Chein, The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion, 26 The Journal of Psychology, 259 (1948) 9

Gallagher, American Caste and the Negro College (1938) 9

Hawley, Dispersion vs. Segregation (unpublished paper), University of Michigan (1944) 9

Johnson, Patterns of Racial Segregation (1943) 158-161 4

Johnson, The Autobiography of an Ex-Colored Man (1927) 7

PAGE

Knight, Value and Price, Vol. XV, Encyclopedia of Social Sciences 13

Mangum, The Legal Status of the Negro (1940) 371-372 4

Marshall, Principles of Economics, Book II, Chapter 15 (1920) 13

McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional, 33 Calif. Law. Rev. 5 (1945) 20

McWilliams, Race Discrimination and the Law, Science and Society, Vol. IX, No. 1 (1945) 8, 19, 21

Myrdal, An American Dilemma (1944) 7

Nelson, The Fourteenth Amendment and the Negro Since 1920 (1946) 5, 10

Report of the President's Committee on Civil Rights, To Secure These Rights (1947) 8, 16, 20

Segregation in Public Schools—A Violation of "Equal Protection", 50 Yale Law Journal 1059 (1947) 9

Stephenson, Race Distinctions in American Law (1910) 36-38, 282 4

21 So. California Law Review 358 (1948) 10

Tuck, Not with the Fist (1946) 7

Waite, The Negro in the Supreme Court, 30 Minnesota Law Review (1946) 10

Ware, The Role of the Schools in Education for Racial Understanding, Journal of Negro Education, Vol. XII, No. 3 (1944) 8

Woofter, Basis of Racial Adjustment (1925) 9

Supreme Court of the United States

OCTOBER TERM, 1948

No. 667

HEMAN MARION SWEATT,

Petitioner,

v.

THEOPHILIS SCHICKEL PAINTER, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM OF AMERICAN JEWISH CONGRESS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

The American Jewish Congress respectfully submits this brief, *amicus curiae*, in support of the petition for certiorari in this case.

The American Jewish Congress was organized in part "to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere". It established its Commission on Law and Social Action in 1945, in part

> To fight every manifestation of racism and to promote the civil and political equality of all minorities in America,

From time to time issues come before this Court involving the basic relationships between the many racial, re-

gious and national groups which make up our multicultural nation. Even where the immediate case does not directly involve Jews, the decision of this Court establishes rules and patterns which have application to all minority groups. Such groups have no defense but justice. If any such group is denied justice, human rights everywhere are insecure.

Such an issue is presented here. The petition for certiorari in this case challenges the constitutionality of state-imposed segregation in the law school of the State of Texas on the ground that it illegally discriminates among persons within the State of Texas on the basis of race.

In support of our belief that segregation of students in publicly supported schools should no longer be given judicial approval, we submit to this Court our view of the basic evils which flow from this statute and the manner in which it perpetuates undemocratic legal, economic and social patterns and our reasons for believing that a writ of certiorari should issue.

Jurisdiction

The judgment of the Texas Court of Civil Appeals was entered on February 25, 1948 (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438, 444). Motion for rehearing was denied on March 17, 1948 (R. 465). On September 29, 1948 application for writ of error to the Supreme Court of Texas was denied without opinion and on October 27, 1948 motion for rehearing was overruled (R. 471).

The petition for writ of certiorari was filed on March 23, 1949 after the issuance of an order by this Court on January 12, 1949 (R. 472) extending the time for such filing up to and including that date. This Court has extended the time to file the brief in opposition to the petition for writ of certiorari up to and including May 21, 1949.

Statement of the Case

This is a proceeding on the application of petitioner, Heman Marion Sweatt, a Negro, for a writ of mandamus to compel the appropriate officials of the University of Texas to grant him admission to its law school. The State of Texas bars all Negroes from attendance at the University of Texas (R. 40-41, 56, 161). School officials concede that petitioner is qualified for admission in all respects save for the disqualification of race. Respondents allege that adequate and equal facilities have been provided in a separate law school for Negroes established pursuant to an order of the District Court of Travis County at an earlier stage of this litigation (R. 424-433). Petitioner claims that his exclusion from the University of Texas and his assignment by the State to a separate "colored" law school contravenes his right to equal protection of the laws under the Fourteenth Amendment.

The Question Presented

The sole question to which this memorandum is addressed is the validity of the doctrine, established by this Court in 1896 in *Plessy* v. *Ferguson*, 163 U. S. 537, that the equal protection of the laws guaranteed by the Fourteenth Amendment may be afforded by the provision of "separate but equal" public facilities for Negro and white residents.

Summary of Argument

In Point I below we state our reasons for urging this Court to issue a writ of certiorari in this case. We show that the issue here is not merely the admission of one man into one school but the admission of an entire people into a community. We show further that the "separate but equal" doctrine, established in 1896, has never been re-

evaluated by this Court and that the pressing nature of the problems created by segregation make such a re-evaluation necessary.

In Point II we argue, in condensed form, that the doctrine of *Plessy* v. *Ferguson* is erroneous. The purpose of this section of the brief is to outline the arguments which we shall present if the petition for a writ of certiorari is granted and we are permitted to file a brief *amicus curiae* on the merits.

ARGUMENT

POINT I

The question whether the equal protection clause of the Fourteenth Amendment can ever be satisfied by the attempted provision of "separate but equal" public facilities for Negro and white residents is one of substantial public importance which should be reconsidered by this Court. The petition for writ of certiorari should therefore be granted.

A. Prior to the liberation of the slaves, the status even of the free Negro in the South as well as other parts of the country was avowedly inferior. In law as well as in practice his rights and privileges were restricted expressly on the basis of race (Stephenson, *Race Distinctions in American Law* [1910] 36-38, 282; Mangum, *The Legal Status of the Negro* [1940] 371-372).

After the abolition of chattel slavery, the Southern states continued to impose inferiority on the Negroes by law. Black codes were widely adopted which restricted the rights of the freedmen, again expressly on the basis of race (Stephenson, *op. cit.*, 40-48; Johnson, *Patterns of Racial Segregation* [1943] 158-161).

The Fourteenth Amendment with its requirement of equal protection of the law was directed against this in-

equality. It was designed to eliminate all unequal treatment on the ground of race at least by official state bodies. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94 (1945). The resistance to this radical change took many forms; but unquestionably the most enduring was the thoroughgoing official program of establishing rigid barriers between Negroes and whites. The barriers were erected by laws requiring separate facilities wherever possible.

These laws were immediately recognized as an effort to circumvent the letter and spirit of the Fourteenth Amendment. They were accordingly attacked in the courts and the issue ultimately reached this Court in the *Plessy* case. In 1896 this Court decided that the laws were valid.

We believe that that decision was erroneous, viewed even as of the time it was issued. Thus, in reaching the astonishing conclusion that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color" (163 U. S. at 544), this Court relied on an 1849 decision by a Massachusetts court (163 U. S. at 544-545). The assumption apparently was that "the nature of things" had in no way been changed by the Civil War and the subsequent constitutional amendments. Furthermore, the Court assumed the constitutionality of an act of Congress requiring separation in the schools of the District of Columbia and applied the same test to the state segregation statute, ignoring the fact that the equal protection clause of the Fourteenth Amendment had no application to the federal territory (163 U. S. at 545). "Whether the conclusions of the majority in this case, which has meant so much to our Negro fellow-citizens were right or wrong, the cynical and superficial character of the opinion cannot escape notice." Nelson, *The Fourteenth Amendment and the Negro Since 1920* (1946), pp. 156-158.

The chief importance of the *Plessy* decision today, however, is its prediction of how the "separate but equal" doctrine would work out in practice. The Court held that

it was a fallacy to believe that enforced separation of the races would "stamp the colored race with a badge of inferiority" and that indeed if the consequences of the doctrine were otherwise, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" (163 U. S. at 551).

At a time when "separate but equal" facilities were just beginning to proliferate, these statements could be made with some plausibility and perhaps even some hope of future validation. Today they do not bear a moment's inspection.

B. Bearing the approval of this Court, the "separate but equal" doctrine has supplied the rationale for a detailed and exhaustive oppression of the Negro population of the South. Where racial segregation is established "every aspect of life is regulated by the laws on race and color. From birth through education and marriage to death and burial there are rules and regulations saying that you are born 'white' or 'colored'; that you may be educated, if colored, in a school system separated on the basis of race and 'as nearly uniform as possible' with that available for whites; that you may marry a person of your choice only if that person is colored, this being the only celebration of marriage a colored minister of the gospel may perform; and that when you die (in Atlanta, at least) you may not be buried in a cemetery where whites are interred.

"But that isn't all. Between birth and death colored persons find that the law decrees that they shall be separated from white persons on all forms of transportation, in hotels or inns, eating places, at places of recreation or amusement, on the tax books, as voters, in their homes, and in many occupations.

"To be specific, it is a punishable offense in Georgia for a barber shop to serve both white and colored persons, or for Negro barbers to serve white women or girls;

to bury a colored person in a cemetery in which white people are buried; to serve both white and colored persons in the same restaurants within the same room, or anywhere under the same license. Restaurants are required to display signs reading *Licensed to serve white people only*, or *Licensed to serve colored people only*. The law also declares that wine and beer may not be served to white and colored persons 'within the same room at any time.' Taxis must be marked *For White Passengers Only*, or *For Colored Passengers Only*. There must be white drivers for carrying white passengers and colored drivers for carrying colored passengers." Ira de A. Reid, *Southern Ways*, Survey Graphic, Jan. 1947, p. 39.

As Myrdal has put it: "The Negro leader, the Negro social scientist, the Negro of art and letters is disposed to view all social, economic, political, indeed even esthetic and philosophical issues from the Negro angle. What is more, he is expected to do so. He would seem entirely out of place if he spoke simply as a member of a community, a citizen of America or as a man of the world. He is defined as a 'race man' regardless of the role he might wish to choose for himself. He cannot publicly argue about collective bargaining generally in America, the need of a national budgetary reform, monetary schemes for world organizations, moral philosophy and esthetic principles. * * * the Negro genius is imprisoned in the Negro problem." Myrdal, *An American Dilemma* (1944), p. 28. Racial segregation "is the dwarfing, warping, distorting influence which operates upon each and every coloured man in the United States. He is forced to take his outlook on all things, not from the viewpoint of a citizen, or a man, or even a human being, but from the viewpoint of a *coloured* man." Johnson, *The Autobiography of an Ex-Colored Man* (1927: first edition 1912), p. 21. Segregation inevitably means "one-sided development * * * ignorance of life outside of one's group." Tuck, *Not with the Fist* (1946), p. 107.

The oppressive character of enforced segregation is compounded by the fact that it creates and enforces divisiveness and promotes interracial hostility. As stated by the President's Committee on Civil Rights in its historic Report of October 29, 1947, "Segregation is an obstacle to establishing harmonious relationships among groups." ("To Secure These Rights," pp. 82-83.)

An acute sociologist has observed: "The general effect of segregation has been to create an ever-widening gulf between the segregated peoples. The absence of social contacts has increased mutual ignorance, suspicion and social distance and has decreased mutual understanding, appreciation and the development of common interests. It has had a narrow and stunting effect and has intensified the unique features of each group. It has frequently resulted in the subordinate group of a feeling of frustration and resignation and in the dominant group of a condescending and patronizing attitude." Professor Louis Wirth, quoted in McWilliams, *"Race Discrimination and the Law,"* Science and Society (Winter, 1945), pp. 20-21. In a segregated school system, "the sheer fact of segregation stands as an eternal reminder to every white child, every day, that the Negro or Mexican children are being kept away from his school. And the children of racial minorities are reminded, daily, that they are outcasts. In each is bred the habit of distance and of stereotyped thinking. Each learns either not to see the other as they pass on the way to school, or to see and to dismiss from attention." Ware, *The Role of the Schools in Education for Racial Understanding.* Journal of Negro Education, Vol. XIII, No. 3, p. 424.

It is plain that "the physical separation of the opposed groups is in itself a barrier to participation by one in the affairs of the other. It also has the effect of throwing into sharp focus the differences between groups; in fact, it accentuates those differences by heightening the visibility of the minority population. In exaggerating the illusion of homogeneity and, at the same time obscuring

the reality of individual variation, spatial segregation provides support for prevailing stereotypes. Prejudicial beliefs are further reinforced by the aspect of concreteness which is lent thereby to social distance." A. H. Hawley, Department of Sociology, University of Michigan, *Dispersion* v. *Segregation*, an unpublished paper (April 14, 1944), quoted in McWilliams, *op. cit. supra*.

As we have noted, the "separate but equal" doctrine was established at a time when its operation could only be surmised. Since that time, the continuously developing methods and techniques of the social sciences have provided us with fresh insights into the nature and effect of segregation. Less conjectural and more empirical, they have produced overwhelming evidence against the segregation principle: Deutscher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 The Journal of Psychology 259 (1948); Bond, *Education of the Negro in the American Social Order* (1934); Gallagher, *American Caste and the Negro College* (1938); Davis & Dollard, *Children of Bondage* (1940); Woofter, *Basis of Racial Adjustment* (1925).

This Court should not continue to extend judicial approval to a notion which has been thoroughly discredited in that laboratory which is the nation itself. Since "every authority on psychology and sociology is agreed" that students subject to discrimination and segregation are profoundly and adversely affected (*Segregation in Public Schools—A Violation of "Equal Protection,"* 50 Yale L. J. 1059, 1061 (1947)), any new evaluation by this Court of the effects of state-imposed segregation must differ greatly from that of the Court which decided the *Plessy* case.

It is not only the factual basis of the *Plessy* decision which has been destroyed. The legal conclusions on which it rested have also in large part been rejected in subsequent decisions of this Court.

Basic to the *Plessy* rationale is the already quoted statement that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish dis-

tinctions based upon color." (163 U. S. at 544). This cannot be reconciled with the many recent decisions of this Court holding, as in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1947): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Furthermore, this Court has refused to apply the "separate but equal" doctrine to housing. *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). This result is not based on the theory that land and houses are *sui generis* but on the broad ground that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities" (334 U. S. at 22).

The plain conflict between this statement and the *Plessy* rule is explored in 21 So. California Law Review 358 (1948). We submit that this conflict should be resolved.

Not since the *Plessy* case was decided in 1896 has this Court squarely stated its position with reference to state-imposed segregation. Waite, 30 *Minn. Law Review* 29 (1946); Nelson, *The Fourteenth Amendment and the Negro Since 1920* (1946). It should do so now. "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944).

Born of a union of bad prophecy with bad history, the *Plessy* doctrine has succeeded in concealing racial hatreds under a mask of legal respectability. We have no doubt that upon re-examination by this Court, the *Plessy* doctrine will be overruled and its capacity for evil will come to an end.

POINT II *

The equal protection clause of the Fourteenth Amendment can never be satisfied by the attempted provision of "separate but equal" facilities for Negro and white residents.

A—State classification and segregation of a racial or religious group as inferior is a denial of equal protection of the laws in violation of the Fourteenth Amendment.

1. THE CONSTITUTIONAL COMMAND OF EQUAL PROTECTION REQUIRES MORE THAN MERE PHYSICAL EQUALITY.

a. The law recognizes such intangibles as location.

It is not disputed that the furnishing by an official body of inferior physical facilities to any given ethnic group is unconstitutional and discriminatory conduct. *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

Mere identity of physical facilities, however, does not necessarily amount to equality either in the economic, political or legal sense. The law would not recognize, for example, that an estate has been divided *equally* between two children each receiving one of the two identical houses comprising the estate, if one of the houses were located in a busy banking district and the other fifty miles from the nearest railroad station. Nor would a probate court accept the division as *equal* even if the two identical houses were located on the same street, opposite each other, but if, for some known or unknown, valid or invalid reason, one side of that street were fashionable and sought-after, the other neglected and rejected. Equality is indeed determined, in fact and in law, not by the physical identity of things assigned in ownership use or enjoyment, but by identity or substantial similarity of their *values*.

The equal protection clause demands, in the enjoyment of government furnished facilities, an equality not less

* The argument in this Section was first developed by the late Dr. Alexander H. Pekalis, Professor, Graduate Faculty, New School for Social Research.

real and substantial than the one it exacts for protection of heirs or partners. It calls for genuine equality and not merely formal or physical identity of treatment. Cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 357, 676 (1938).

b. In determining equality of value, social values must also be considered.

In their turn, values do not depend solely or even primarily on the physical properties of things or facilities to be valued but also on the "social location" of these things or facilities, on their social significance and psychological context or, in short, on the community judgment attached to them. "In approaching cases, such as this one, in which certain constitutional rights are asserted, it is incumbent upon us to inquire not merely whether its rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled." *Oyama* v. *California*, 332 U. S. 633 (1948).

It is a well-known fact that the value and desirability of many objects, facilities, traits or characteristics may depend not so much upon their intrinsic qualities or defects, advantages or shortcomings as upon their association with or use by persons enjoying a certain reputation. The value of a mediocre type of fabric may be enhanced by an *arbiter elegantiarum* wearing it; the desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. If a group considered "inferior" by the prevailing community sentiment adopts any given color of garment, accent of speech, or place of amusement, that color, accent or place will automatically be shunned by the majority and become less desirable or valuable.

The theory, sometimes advanced in the area of racial segregation, that physical equivalence is complete equivalence, is not duplicated in any other aspect of social affairs. It is a confusion that stems from the belief that costliness

is synonymous with value, expensiveness a guarantee of worth. We never make this mistake in our dealings in the market place. No matter how expensive or complicated an object in its manufacture, it is made totally worthless if it is rejected or reviled by community opinion. See Frank H. Knight, *Value and Price*, p. 218, Vol. 15, Encylopedia of Social Sciences. See also, Alfred Marshal, *Principles of Economics*, Book II, Chapter 15 (8th Ed., 1920). In short, if equality is to be meaningful it must include equality in "social location."

It is manifest then that even assuming that a Negro school were built which duplicated exactly the physical plant of a white school, inferiority would still stem from the fact that the Negro school would be reserved for those who are not eligible for attendance at regular institutions. Thus, no matter how attractive the facilities of a Negro school were made or how wide its doors were flung, non-Negro students would assuredly abstain from seeking admission into its halls. Nor would the Negro students in attendance regard themselves as in a position of equivalence.

2. A STATE MAY NOT USE THE DEVICE OF SUPPLYING SEGREGATED FACILITIES IN ORDER TO PLACE A RACIAL OR RELIGIOUS GROUP IN AN INFERIOR STATUS.

It could hardly be disputed that a statute providing for the confinement of racial or religious groups to separate parks, schools and recreational facilities upon the declared theory that the group is inferior would be discriminatory and therefore unconstitutional. *Hirayabashi* v. *U. S.*, *supra*; *Korematsu* v. *U. S.*, 323 U. S. 214 (1944); *Oyama* v. *California*, *supra*. This result is required by the fact that an official declaration of inferiority would of itself establish an inferiority of value. And it would be subject to the restraint of the Constitution because the declaration, itself possibly immune to constitutional attack, would be accompanied by action having a discriminatory effect.

The official assignment to separate parks, schools or halls based on an officially stated conviction of inferiority would be an assignment of facilities *inferior per se*, regardless of their physical identity with the facilities assigned to the "better" group.

The situation as here described could not be characterized as merely *social* inequality. We may assume that social inequality has antedated the enactment of the assumed statute or regulation. But a legislative or administrative declaration of that pre-existing social inferiority and the ensuing action of assignment of facilities, inferior because segregated, amount to the creation of a *legally sanctioned* inequality.

The discriminatory effect of such legally sanctioned inequality can be demonstrated by reference to recent tragic history. The Nazis understood it fully when they imposed on Jews the wearing of the Yellow Star of David. *Polizeiverordnung ueber die Kennzeichnung der Juden vom L. September 1941*, RGBl, I. S. 547, ausgeg. am 5. IX. 1941.

3. THE PLACING OF A RACIAL OR RELIGIOUS GROUP IN AN INFERIOR STATUS BY SEGREGATION CAN BE ACCOMPLISHED BY THE STATE WITHOUT AN EXPRESS DECLARATION OF SUCH STATUS.

We do not have here, of course, an express statement by the State of Texas that the purpose of its segregation statute is to maintain inequality. Nevertheless, the same result must be reached if that is in fact its purpose. Official action will not be allowed to accomplish by indirection what it may not achieve openly. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295 (1884); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886); *Guinn* v. *United States*, 238 U. S. 347, 364 (1915); *Myers* v. *Anderson*, 238 U. S. 368 (1915); *Neal* v. *Delaware*, 103 U. S. 370 (1881).

The failure of a statute or regulation expressly to declare a legal inferiority does not protect it from the scrutiny of the courts. When the reasonableness of a legis-

lative classification is in question, the courts will look behind the apparent classification to determine the real intent of the law and whether or not, in fact, an illegal classification has been made. *Henderson* v. *Mayor*, 92 U. S. 259, 268 (1875); *Bailey* v. *Alabama*, 219 U. S. 219, 244 (1911); *Penn Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922). Thus, in *Yick Wo* v. *Hopkins, supra*, this Court declared (118 U. S. at p. 373): "Though the law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The implicit rather than the explicit declaration of inferiority may be made in at least two ways: First, the state may have established the inferiority in other official acts. Thus, if statutes, judicial decisions or other official pronouncements declare that a particular race is inferior, the assignment of separate facilities becomes an assignment of inferior facilities. We shall show below that such independent declarations of inferiority have in fact been made.

Second, the state may by its segregation policy impliedly adopt an already established social inferiority. Official adoption of social classifications of necessity implies the adoption of the meaning inherent in, and inseparable from, the classifications themselves, that of the respective inferiority and superiority of the groups. It may be doubted whether or not law should take affirmative steps to eliminate social inequality. But it seems certain that law may not adopt, sanction and enforce it. Whenever law adopts a social classification based on a notion of inferiority, it transforms the pre-existing *social* inequality into *legal* inequality. What ensues is official discrimination, a denial of equality before the law, whether or not the statement of inferiority is made openly by the government or inheres in the classification upon which official action is based.

The reason that constitutional inhibitions attach when the state gives legal effect to pre-existing social inequalities is that the state's action causes a change in both the degree and nature of the inequality. Once a social classification based on group inferiority is "adopted" by the law, the ensuing legal inferiority will in its turn intensify and deepen the social inequality from which it stems. The actual operation of segregation statutes illustrates this oppressive function of the law. It is well known, for instance, that the doctrine of "separate but equal" facilities has proved to be a mere legal fiction in most cases, that invariably segregation has been accompanied by gross discrimination, and that absolute equality seldom, if ever, exists. For example, the President's Committee on Civil Rights found that the "separate but equal" doctrine "is one of the outstanding myths of American history for it is almost always true that while indeed separate these facilities are far from equal." ("To Secure These Rights," pp. 81-82.)

This situation involves at the same time another kind of vicious circle. The effect of segregation laws makes their spontaneous repeal or amendment a practical impossibility. When a more or less inarticulate social feeling of racial superiority is clothed with the dignity of an official law, that feeling acquires a concreteness and assertiveness which it did not possess before. The stricter the law, the stronger and the more articulate the feeling of social distance. And the stronger that feeling, the stricter the law and the more difficult its amendment or repeal. In such setting the democratic processes themselves are threatened and no reliance can be placed on their correcting effect. It is this type of situation which Chief Justice Stone had in mind when, in sustaining an economic measure as presumptively valid, he warned that the decision did not foreclose the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial

scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and whether "similar considerations enter into review of statutes directed at particular religious * * * or national * * * or racial minorities * * *." Accordingly, he noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products*, 304 U. S. 144, 154, footnote 4 (1938).

We shall show in the following sections that the system of segregation is in fact designed to maintain inequality; and that it has no other basis.

B—The system of State-controlled segregation of Negroes is designed to maintain them in an officially declared status of inferiority and in a previously established status of social inequality.

1. Official Declaratons of Inferiority.

State imposed segregation stems directly from a vestigial theory of the superiority and inferiority of races inherited as a remnant of the institution of slavery. With the freeing of slaves, attempts were made by the dominant white group to preserve its position of ascendancy by the enactment of discriminatory legislation. "It required little knowledge of human nature to anticipate that those who had long been regarded as *an inferior and subject race* would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1879) (italics supplied). Thus, in the post-slavery period, Negroes were punished with greater severity than whites for identical offenses. See *General Laws under the Seventh Legislature of the State*

of Texas, Chapter 121. And Negroes were made incompetent as witnesses in proceedings against white persons. *Laws passed by First Legislature of the State of Texas, An Act to regulate proceedings in a District Court, Section 65.* In the State of Texas the abiding conviction of the inferiority of the Negro race is manifest even in its assessment statutes. "Assessors shall receive 3¢ for each white inhabitant residing in the county * * *. 2¢ for each white inhabitant in a town or city and 1¢ for each slave or free person of color." *Laws passed by the First Legislature of the State of Texas, An Act to Provide for the Enumeration of the Inhabitants.*

These official declarations of inferiority have by no means been abandoned by Texas or the other Southern states. They are maintained and reiterated in the many decisions holding that the word "Negro" or "colored person" when applied to a white person gives rise to a cause of action for defamation. *Flood* v. *News & Courier Co.*, 71 S. C. 112 (1905); *State* v. *Cousins*, 242 F. 794 (1917). The attitudes of these Courts is clear. "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic times denies equality." *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499. See also *O'Connor* v. *Dallas Cotton Exchange*, 153 S. W. 2d 266 (Tex., 1941). Similarly, the highest Court of Oklahoma has declared: "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected unsurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous *per se* to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge

of this character." *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229 (1919).

In the face of these official pronouncements, the policy of segregation cannot be treated as equal and impartial.

2. The Previously Established Social Inequality.

"Supremacy" is not "equality." That proposition needs no elaboration. Yet it is easy to show that the doctrine of segregation is irrevocably linked with the equally widely held, though admittedly unconstitutional, doctrine of "white supremacy." At the very least, it has led to that doctrine, as Justice Harlan predicted in his dissenting opinion in *Plessy* v. *Ferguson*, 163 U. S. at pp. 559-564.

It is consequently not strange to find that students of segregation statutes uniformly find that they rest on notions of superiority: "Systematic discrimination against a racial minority usually assumes the form of segregation. The subordinate status of the group may, in fact, be inferred from the modes of segregation to which it is subjected." McWilliams, *Race Discrimination and the Law*, Science and Society, Vol. IX, No. 1 (1945). Indeed, the entire pattern of mores governing Negro-white relationships is inexplicable except in the terms that "In the magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it, and that feeling applies to every single Negro * * * the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." Under these conditions "it is fallacious to say * * * that the intention and effect [of segregation] is not to impose any badge of inferiority * * * When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and when a white man and woman is seated on the fourth seat, separated only by a bit of wire mesh ten inches high on the back of the third seat this is a

'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' celebration." McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif. L. Rev. 5 at p. 27 (1945).

It is equally important that those states which have rejected the theory of inferiority by passing laws prohibiting racial discrimination have uniformly interpreted those laws as prohibiting segregation. *Joyner* v. *Moore-Higgins Co.,* 152 App. Div. 266 (N. Y., 1912); *Ferguson* v. *Gies,* 82 Mich. 358 (1890); *Bolden* v. *Grand Rapids,* 239 Mich. 318 (1927); *People* v. *Board of Education of Detroit,* 18 Mich. 400 (1869); *Crosswaith* v. *Berger,* 95 Colo. 241 (1934); *Jones* v. *Kehrlein,* 194 P. 55 (Cal., 1920); *Prowd* v. *Gore,* 207 P. 490 (Cal., 1922); *Wysinger* v. *Crookshank,* 23 P. 54 (Cal., 1890); *Tape* v. *Hurley,* 66 Col. 473 (1885); *Anderson* v. *Pantages,* 114 Wash. 24 (1921); *Randall* v. *Coulitz Amusements,* 194 Wash. 82 (1938); *Baylies* v. *Curry,* 128 Ill. 287 (1889); *Pickett* v. *Kuchan,* 323 Ill. 138 (1926); *Clark* v. *Directors,* 24 Iowa 67 (1868).

C—The system of State-imposed segregation of Negroes serves no purpose other than to maintain Negroes in an inferior status.

Among the reasons sometimes given for maintaining segregation are that it is necessary to prevent racial conflict, that it is based on natural law and that it is essential to prevent "mongrelization" of the race.

The first of these propositions is rejected by all recent students of segregation. They find, on the contrary, that is promotes conflict. Thus, the President's Committee on Civil Rights found that "the 'separate but equal' doctrine has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony." ("To Secure These Rights," p. 87.) "Segregation as a supposed instrument of social order has shown itself as a source of social chaos. During the race riots in Detroit

in 1943, rioting occurred in sections of the city inhabited exclusively either by white or colored citizens, but not in sections where the two races lived side by side. Disturbances occurred in plants where black and white workers were segregated; not where they worked side by side." McWilliams, *Race Discrimination and the Law*, Science and Society (Winter, 1945).

Space does not permit discussion here of the other defenses of segregation. We respectfully refer the Court to the illuminating opinion of the California Supreme Court in *Perez* v. *Lippold*, 32 Adv. Cal. 757, 198 Pac. 2d 17 (1948), which entirely demolishes the argument that segregation laws are necessary either to enforce natural law or to prevent the degradation of mankind.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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